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BARGAINING IN THE SHADOW OF (INTERNATIONAL) LAW: WHAT THE NORMALIZATION OF ADJUDICATION IN INTERNATIONAL GOVERNANCE REGIMES MEANS FOR DISPUTE RESOLUTION

BY ANDREA K. SCHNEIDER¹

In 1999, this journal hosted a symposium examining the impact of the proliferation of international courts. This current symposium, ten years later, is designed to examine the patterns, problems, and possibilities of this proliferation. The use of courts for a variety of international disputes has now been normalized—expected, widely used, and usually followed. In the area of human rights, the expansion of the use of courts has been dramatic and rapid. Using dispute resolution theory, this article examines the patterns, problems, and possibilities of this normalization of adjudication for international human rights. From the perspective of consensual dispute resolution, it is quite interesting to address what the impact of the normalization of adjudication means.

The first section of this article looks briefly at some of the patterns in human rights adjudication. Both the growth in regional human rights courts and in international criminal prosecution has continued to push the law forward. At the same time, consensual dispute resolution in the United States continues to expand, at the expense of traditional trials. While not necessarily apparent, similar goals and values drive the increase in international trials and the decrease in U.S. trials.

Second, this article examines the challenges international adjudication poses to dealing with human rights violations and transitional justice situations. Simplistically, these tensions can be viewed as the need to strike a balance between peace and justice, top-down implementation and bottom-up impact, and

1. Professor of Law, Marquette University Law School. My thanks to Carrie Menkel-Meadow and Lisa LaPlante for their helpful comments. Thanks to Amanda Tofias for her excellent research assistance. Finally, my thanks to the organizers of the NYU Symposium and the editors of the NYU Journal of International Law and Politics.

process efficiency and conflict customization. The good news is that these challenges have been slowly working themselves out as the next generation of international adjudication models continues to improve.

This continued improvement and normalization leads to an even more interesting question—what are the possibilities for human rights adjudication in the future? The third section of this article, looking through the lens of dispute resolution theory, addresses at least two intriguing developments that could occur in the next ten years. The first development might be the normalization of consensual international processes that mirror, at least to some degree, U.S. process. After moving away from negotiation toward judicialization of international disputes, the pendulum might start to swing back toward negotiated settlements. Will individual defendants be more likely to plea bargain (as has already occurred)? Will states be willing to work out settlements with their human rights victims prior to trial? Given the potential risks involved in these developments, the international community needs to be vigilant so that the rule of law, rights, and equality are still protected through these consensual dispute resolution processes. Second, the shift to broad community reparations like health care and education ordered by tribunals and truth commissions opens up a new chapter in more appropriate remedies for human rights victims.

I. PATTERNS DEVELOPING IN INTERNATIONAL HUMAN RIGHTS ADJUDICATION

The normalization of international human rights adjudication presents an interesting dichotomy between forms of dispute resolution in the domestic and international contexts. On the one hand, domestically, the United States and other countries increasingly use forms of consensual dispute resolution. The development of alternative dispute resolution (ADR) in the U.S. court system is discussed briefly below. On the other hand, formal adjudication is increasingly the norm for resolving all sorts of disputes internationally. The growth of these two systems is linked by common concerns, such as fairness, ensuring that participants have a voice in the dispute resolution process, and guaranteeing procedural justice.

Patterns of Domestic Dispute Resolution

The development of ADR in the U.S., and the theories behind it, form the basis for an interesting comparison with international adjudication. How did we arrive at ADR? There are various explanations, which somewhat overlap. The first set of explanations focus on increased time pressure on the courts during the 1960s and 1970s. These arguments help to explain why judges and judicial observers favored court-connected ADR. During this period, laws in the United States changed to grant more rights to minorities, women, injured consumers, environmentalists, and others. These groups then used the courts to protect these rights.² In addition, some scholars argue that the types of cases now being brought to the courts—more complex, multiparty suits often involving a government agency—place additional pressures on the courts. Pushing against these developments was the speedy trial requirement in criminal cases, which pressured courts to limit the number of civil cases on their dockets.³

For litigants with simpler cases, the overcrowded docket and resulting delay of their case could also increase their willingness to use ADR. “New” plaintiffs could want to avoid the courts that had become so slow that they were no longer effectively enforcing the laws. Defendants could want to use ADR to avoid or manage the rights newly granted to plaintiffs. And perhaps the law itself had become so standardized in certain areas that we no longer needed the careful process provided by courts to establish and interpret the law.

Theorists also hoped that, in addition to docket control and saving money, ADR would allow parties to participate in the dispute resolution process and give them more control over the outcome of their disputes.⁴ Dispute resolution offers parties at least a perception of substantive control through the ability to speak for themselves and be heard in a respectful manner.⁵ Parties can decide when and how to settle, can meet

2. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW: RESOLVING DISPUTES WITHOUT LAWYERS* 116-18, 123-24 (1983).

3. *Id.* at 122-23

4. CARRIE MENKEL-MEADOW, ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 32-33 (2004).

5. See Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. Disp. Resol. 179, 185

their own needs for cost savings and quick resolution, and can craft personalized agreements to meet their interests. Recent writing on ADR also focuses on fairness of process and the need to give parties a voice in determining that process.⁶ Research indicates that when parties perceive that they have exercised process control, they are also more likely to assume that they have a level of control over the outcome. Even if the outcome is unfavorable, parties are more likely to perceive that outcome as substantively fair. On the other hand, when parties feel like they do not have a voice, the process is more likely to be seen as unfair.⁷

The proliferation of alternative dispute resolution in U.S. courts has resulted in a move away from trials.⁸ In 1962, 11.5 percent of federal civil cases went to trial,⁹ but in 2007 only 4.1 percent did so.¹⁰ Examining even the limited statistics of state courts shows a similar trend of decreased trials.¹¹ In the courts of general jurisdiction of 22 states (and the District of Columbia) the absolute number of jury trials fell one-third from 1976 to 2002 and the absolute number of bench trials fell 6.6 percent.¹² Instead of relying on courts, parties in the United

(“The presence of four particular process elements result in heightened perceptions of procedural justice: the opportunity for disputants to express their ‘voice,’ assurance that a third party considered what they said, and treatment that is both even-handed and dignified.”).

6. See Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights From Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 52-53 (2004).

7. See generally Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001) (exploring consequences of parties’ decreased role in mediation).

8. Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Court*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).

9. Mark Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 7.

10. Note that these figures reflect the percentage of total terminated cases that were terminated during or after trial including those that may have settled during or after trial. These figures are based on Table C-4A of the Administrative Office of the United States Courts, *2007 Annual Report of the Director: Judicial Business of the United States Courts*, available at <http://www.uscourts.gov/judbus2007/appendices/C04ASep07.pdf> (last visited Apr. 12, 2009).

11. Galanter, *supra* note 8, at 508 fig.32 (citing Brian J. Ostrom et al., *Examining Trial Trends in the State Courts*, 1 J. EMPIRICAL LEGAL STUD. 755, 776 (2004)).

12. *Id.*

States use negotiation and mediation to settle the vast majority of disputes.

Patterns of Increased International Judicialization

At the same time, international disputes are more likely than ever to be resolved through a trial or adjudicatory method.¹³ For example, in the human rights arena, the caseload of the standing courts for the Inter-American Court of Human Rights (ICHR) and the European Court of Human Rights (ECHR) continues to grow.¹⁴ The ICHR has seen an explosion in its caseload, with over half of its total cases arising since 2001.¹⁵ Similarly, the ECHR has dealt with a large number of cases, delivering more than twice as many judgments in 2007 alone as it did in the entire 42-year span from 1955-1997.¹⁶ Not only has the number of cases in standing courts increased, the number of ad hoc courts established to deal with human rights violations has also grown. These criminal courts conduct their own investigation and prosecution. The trend started with Nuremberg trials at the end of World War II¹⁷; after a hiatus marked by the Cold War, the international community, through the UN, moved to establish a veritable plethora of ad hoc tribunals to deal with conflicts.¹⁸ The In-

13. Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 173 (2008).

14. Andrea Kupfer Schneider, *Not Quite a World Without Trials: Why International Dispute Resolution Is Increasingly Judicialized*, 2006 J. DISP. RESOL. 119, 121-22 (2006).

15. The ICHR has seen 180 cases since it began in 1987 and over 90 of those of been seen since 2001. Inter-American Court of Human Rights, Jurisprudence: Decisions and Judgments, <http://www.corteidh.or.cr/casos.cfm?&CFID=634670&CFTOKEN=53409753> (last visited Apr. 12, 2009).

16. Additionally, the ECHR judgments of 2007(1,503) are more than ten times as numerous as those made in 1998(105). The ECHR has also seen more cases allocated to a decision body in 2007 (41,700) than it did in the entire 42 year period from 1955-1997 (39,047) and far in excess of the 5,981 allocated in 1998. European Court of Human Rights, *Annual Report 2007* at 149, available at http://www.echr.coe.int/NR/rdonlyres/59F27500-FD1B-4FC5-8F3F-F289B4A03008/0/Annual_Report_2007.pdf (last visited Apr. 12, 2009).

17. See Charter of the International Military Tribunal, Nuremberg Trial Proceedings, art. 14-15, Aug. 8, 1945, available at <http://avalon.law.yale.edu/imt/imtconst.asp> (last visited Apr. 12, 2009).

18. See, e.g. United Nations, Rome Statute of the International Criminal Courts, available at <http://untreaty.un.org/cod/icc/statute/rome.htm>

ternational Court for the Former Yugoslavia and the International Court for Rwanda were established virtually simultaneously in 1993 and 1994 to deal with the civil war that tore Yugoslavia apart and the horrors of the Rwandan genocide.¹⁹ The trend for more courts continued throughout the 1990s and into this century, with tribunals established in Sierra Leone, East Timor, and other areas.²⁰

Aside from human rights, the most significant area of increased international judicialization is in the economic field. One of the foremost examples of this judicialization is the World Trade Organization (WTO), which replaced a failing diplomatic system (the General Agreement on Tariffs and Trade, or the GATT) with arbitral panels and a standing appellate body to resolve economic disputes.²¹ The WTO has continually expanded its caseload, with over 370 cases since its inception in 1994.²² The European Court of Justice (ECJ)²³ and the World Bank's International Center for Settlement of Investment Disputes (ICSID)²⁴ have also evolved to serve as are-

(last visited Apr. 12, 2009) (acting as an example of an international court established to handle international crimes; including genocide). .

19. For the Yugoslav tribunal, see S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); for the Rwanda tribunal, see S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

20. Special Court for Sierra Leone, <http://www.sc-sl.org/> (last visited Apr. 12, 2009); International Center for Transitional Justice, Commission for Reception, Truth and Reconciliation for East Timor, <http://www.ictj.org/en/news/features/846.html> (last visited Apr. 12, 2009).

21. Schneider, *supra* note 14, at 120 (citing Joel R. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 58 (1996); ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* (1997); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398 (1997)).

22. See World Trade Organization, Chronological List of Dispute Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Apr. 12, 2009).

23. The ECJ has seen the largest caseload of the international economic dispute organizations with over 4000 new cases in the last eight years (2007-2000) and a record 580 new cases in 2007. The Court of Justice of the European Communities, 2007 Annual Report: Statistics of judicial activity of the Court of Justice at 80, *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/07_cour_stat_2008-09-29_13-39-23_731.pdf (last visited June 28, 2009).

24. The ICSID has completed 159 cases since its creation and there are currently 123 pending cases. International Center for Settlement of Investment Disputes, List of Concluded Cases and List of Pending cases, <http://>

nas for judicialized resolution of international economic disputes, and they have likewise seen large caseloads.²⁵

Additionally, the International Court of Justice (ICJ)'s caseload continues to slowly and steadily increase. While countries seemed reluctant to bring cases in the first few decades of its establishment, that reluctance has dissipated and the court is busier than ever.²⁶ The global push for courts has moved beyond economic and human rights issues to border and maritime disputes. The newly created Law of the Sea Tribunal has started to hear cases.²⁷

This essay does not argue that international adjudication has replaced international ADR structures or traditional diplomacy because that definitely is not the case. In the same timeframe that we have seen tribunals established to deal with the aftermath of conflicts, many of these conflicts have actually been resolved by negotiation or mediation. In Bosnia, Richard Holbrooke used mediation to bring the parties together at Dayton.²⁸ In Northern Ireland, George Mitchell used mediation to forge the Good Friday accords.²⁹ These and others³⁰

icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases (last visited Apr. 12, 2009). See generally Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161 (2007).

25. See Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. Rev. 1, 44-47 (2007).

26. View ICJ current docket at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (last visited Apr. 12, 2009).

27. See United Nations Convention on the Law of the Sea, Agreement Pertaining to the Implementation of Part XI of the Convention, Dec. 10, 1982, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindxAgree.htm (last visited Apr. 12, 2009). Since 1997, the tribunal has already had 13 cases on its docket, available at http://www.itlos.org/start2_en.html (last visited Apr. 12, 2009).

28. Daniel Curran et al., *Two Paths to Peace: Contrasting George Mitchell in Northern Ireland with Richard Holbrooke in Bosnia-Herzegovina*, 20 NEGOT. J., 513, 514-25 (2004).

29. See GEORGE MITCHELL, *MAKING PEACE* (1999); Daniel Curran & James K. Sebenius, *The Mediator as Coalition Builder: George Mitchell in Northern Ireland*, 8 INT'L NEGOT. 111 (2003).

30. See generally John W. McDonald, *A New Future for Kashmir?*, in THE NEGOTIATOR'S FIELDBOOK 715-23 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) (providing a summary of progress in negotiations between India and Pakistan over the disputed territory of Kashmir).

are fine examples of ADR in action and have been lauded, studied, and cited widely in ADR literature.

There are also great examples of mixed processes being created that resemble arbitration at the international level, from the Iran Claims Tribunal,³¹ to the Swiss Claims tribunal established to deal with Holocaust bank claims,³² to the Eritrea-Ethiopian boundary claims commission.³³ Therefore, it is not that the international community has rejected diplomacy, but rather that it has focused on balancing diplomacy with the need for trials.

C. *Converging patterns of procedural justice*

The normalization of international adjudication reflects the implementation of the same values as the normalization of ADR in the U.S. The goal of both movements is to find a procedurally just process that can produce satisfactory results. Perceptions of procedural justice are dependent on participants' perceptions of the process's fairness.³⁴ When individuals have a voice in the process, the process as well as the outcome will be perceived to be fairer.³⁵ This need for voice is not limited to domestic disputes and can explain the trend toward trials internationally as well.

31. For a history of the tribunal, see Iran-United States Claims Tribunal, Background Information, <http://www.iusct.org/background-english.html> (last visited Apr. 4, 2009).

32. For a description of the history and purposes of the tribunal, see Holocaust Victims Claim Resolution Tribunal, Official Information Website, http://www.crt-ii.org/index_en.phtml (last visited Apr. 4, 2009).

33. For a history of the tribunal, see Nejib Jibril, Note, *The Binding Dilemma: From Bakassi to Badme—Making States Comply with Territorial Decisions of International Judicial Bodies*, 19 AM. U. INT'L L. REV. 633 (2004).

34. See Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985) (finding that voice heightens procedural justice judgments and leadership endorsement even when disputants perceive that they have little control over the decision). For additional analysis of disputants' perceptions of the resolution process see E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 215 (1988).

35. But see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 807-09 (2001) (arguing that giving unfettered voice to disputants can digress into emotive venting and advocating the use of the more pragmatic language of the legal marketplace).

In the international realm, this desire for voice, control, and procedural justice has manifested itself in the creation of trials. The international economic adjudicatory mechanisms are a prime example.³⁶ At the WTO, where only states can bring cases, the dispute resolution system gives voice to countries in new ways. Less powerful countries that had no previous ability to negotiate with more powerful countries when trade agreements were violated can now bring cases to the WTO and know that they will be heard.³⁷ The WTO process and its enforcement mechanisms also help ensure that equally powerful countries will not come to stalemates in negotiation but, rather, will adhere to trade law for the benefit of all.³⁸

With the ECJ, the EU gives direct voice to citizens when laws directly affect them.³⁹ Citizens of member states can bring cases in their own domestic courts against the governments of other member states for violating treaty provisions (e.g., a country promising to lower a tariff and not doing so).⁴⁰ If the case concerns EU law, the domestic court has the ability to refer the case for a hearing in front of the ECJ and must refer if the court is the court of last resort.⁴¹ Over time, this provision has ensured that thousands of cases have been heard

36. Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 700-03 (1999).

37. See Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 LAW & CONTEMP. PROBS. 257, 266 (2008).

38. Andrea Kupfer Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587, 631-32 (1998).

39. See ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* 8 (1997) ("Political theory, and historical experience (e.g. in the context of EC law and of the European Convention on Human Rights), confirm that granting actionable rights to self-interested citizens offers the most effective incentives for a self-enforcing liberal constitution."). See generally, Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

40. See George Tridimas & Takis Tridimas, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, 24 INT'L REV. L. & ECON. 125, 128 (2004) ("Community law is to be applied not only by the ECJ but also by national courts, thus enabling citizens to enforce their Community rights in the national jurisdictions.").

41. See *id.* at 126 ("Article 234 draws a distinction between lower national courts, which have discretion to make a reference, and national courts of final instance, which are under an obligation to refer.").

between individuals and governments. Historically, sovereign immunity would have prevented these cases from ever reaching courts, but a new understanding of how law needs to be created and enforced has given individuals voice and a place where they can be confident they will be heard in enforcing laws that most directly benefit them.⁴²

In disputes focused on human rights, the creation of trials—both prosecutions dealing with war crimes and cases brought by individuals against their government for violations—gives voice to individuals. In both of these arenas—international criminal law and human rights law—giving individuals voice results in more enforcement of the law. That may also explain why the push for trials at the international level has been so powerful.

Various types of concerns with legitimacy have risen from these courts. Early on, concerns with the “democracy deficit” led many to speculate that more direct representation was needed.⁴³ Joseph Weiler has written more recently about concerns with the decisions of international courts. Unlike those who have praised the unanimity of international courts and the clarity that a unanimous decision provides, Weiler has pointed out that this “oracular” decision making leaves participants speculating about the basis for the decision.⁴⁴ His argument, that the court needs to demonstrate that it has listened to all parties and all arguments, is another way of expressing the same concern about procedural justice. Dispute system design, discussed in the next section, provides a way of examining the structures of international adjudication in order to provide more legitimacy.

42. See Schneider, *supra* note 38, at 629 (“Better policing of a trade agreement will occur if enforcement relies on those who are most invested with protecting their rights and benefits under the trade agreement.”).

43. *Id.* at 592.

44. J.H.H. Weiler, Joseph Straus Professor of Law, NYU School of Law, Remarks at the NYU Journal of International Law and Politics Symposium: The Normalization of Adjudication in Complex Governance Regimes: Patterns, Possibilities, and Problems (Oct. 28-29, 2008).

II. PROBLEMS AND CHALLENGES OF THE NORMALIZATION OF HUMAN RIGHTS ADJUDICATION

Through the lens of dispute resolution theory, this section of the article examines some of the growing pains in human rights adjudication. Dispute System Design (DSD) provides a concrete method by which to measure the success or effectiveness of any system created to resolve disputes.⁴⁵ When evaluating a dispute resolution system using DSD, the first question to ask is why the system was established. This question helps to identify the system's specific purpose or purposes. In answering this question as regards international adjudication, one must address whether consensual dispute resolution furthers that purpose. The second question to ask when using DSD is who gets to participate in the system and who has rights. According to DSD principles, the structure should strive for inclusiveness, broad coverage of the conflict issues, and depth of jurisdiction. The structure should also have central sources of information while, at the same time, decentralizing discussions among participants in multiple forums.⁴⁶ The third question asks whether the system reflects the community for which it is being established. The system should vest control over decisions in those most interested and affected by those decisions. The system needs to reflect the particular needs and culture of that community. A final principle of DSD, learning from experience, will be discussed as we answer each of the questions above.⁴⁷

A. *Why are we establishing a Dispute System?*

As conflicts end, leaving victims in their wake, countries face the challenge of determining what type of response is necessary. Goals of those involved include an end to the violence, justice for the victims, and perhaps even reconciliation among

45. See CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 44-48 (1996); Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133, 136, 138-39 (2003).

46. Shariff, *supra* note 45, at 148-50.

47. Cf. Franck, *supra* note 24, at 184-85 (discussing DSD as applied to investment treaty experiences in Argentina).

the groups or factions. Yet the political or judicial process often falls short of these goals.

The choice of process has often seemed to fall into one of two categories—amnesty to those involved, or prosecution. Of course, there are also simpler ways to achieve justice. After World War II, Churchill famously suggested that instead of the Nuremberg Tribunal, the Allies could just take the Germans out back and shoot them.⁴⁸ While fast and inexpensive, Roosevelt argued successfully that this approach would have prevented crucial law and precedent from being set. Throughout the 20th century, however, amnesty was very much the norm. In many countries it seemed to be enough if the political leadership changed, perhaps amnesty was granted, and the population appeared to be willing to move on. In Argentina, Chile, and several other South American countries, amnesty was granted to the military leadership in exchange for them stepping down.⁴⁹ As Professor Carlos Nino has argued, “a legal duty selectively to prosecute human rights violations committed under a previous regime is too blunt an instrument to help successor governments who must struggle with the subtle complexities of re-establishing democracy.”⁵⁰

Today, the need for immediate peace between the parties, the desire for swift justice, and the long-term goal of a more lasting peace among the warring groups regularly provides conflicting concerns for scholars and international dispute systems designers alike.⁵¹ Is it more important to stop the vio-

48. NORBERT EHRENFREUND, *THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIALS CHANGED THE COURSE OF HISTORY* 7 (2007); 1 DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT* 28 (1999).

49. Note that in Argentina and Chile, the outcomes were quite different. In Argentina, there was relatively complete regime change as most of the military stepped down from leadership. In Chile, on the other hand, Pinochet and other military officers stayed in political life. As I discuss later, both of these amnesty laws have since been repealed.

50. Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2638 (1991).

51. See John Paul Lederach, *Cultivating Peace: A Practitioner's View of Deadly Conflict and Negotiation*, in *CONTEMPORARY PEACEMAKING: CONFLICT, VIOLENCE AND PEACE PROCESSES* 36, 36-44 (John Darby & Roger Mac Ginty eds., 2003) (critiquing the ripeness metaphor that has emerged concerning timing of negotiation in violent conflicts); Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Plural Legal Processes*, 94 GEO. L. J. 553

lence or to pursue justice by punishing those responsible for human rights violations?⁵² The tension arises because, arguably, oppressive dictators and war criminals will not want to give up power (and thus stop the violence) if they will be hauled into court the next day.

The recently-ended twenty-year civil war in Uganda between the government and the notorious Lord's Resistance Army (LRA) provides a clear example of the tension between peace and justice. The leader of the LRA, Joseph Kony, was offered total amnesty by political leaders in Uganda, despite having committed horrific war crimes, if he would end the vicious rebellion in northern Uganda. In the midst of ongoing domestic negotiations, the International Criminal Court (ICC) indicted him and four of his deputies, throwing the peace negotiations into disarray.⁵³ Many political leaders accused the ICC of preventing peace in the region by interfering with their own domestic negotiations.⁵⁴

But, with a longer view of most conflicts, it seems apparent that peace versus justice is a false dichotomy. In most situations of gross human rights violations, the populations and

(2006) (Essay-text of the Inaugural Lecture of the A.B. Chettle, Jr. Chair In Dispute Resolution and Civil Procedure discussing formative and influences and underlying values of processes seeking peace and justice). See generally Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801 (2006) (addressing the "peace versus justice" problem at the International Criminal Court); Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MICH. ST. DCL J. INT. L. 595 (1999) (discussing the "interplay between national amnesties and the international norms regarding individual criminal responsibility for grave human rights violations"); Michael P. Scharf, *From the Exile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339 (2006) (discussing legal and practical implications of declining to prosecute as part of peace arrangements).

52. For a short discussion considering the same question in the context of Middle East peace treaty goals see Andrea Kupfer Schneider, *The Day After Tomorrow: What Happens Once a Middle East Peace Treaty is Signed?*, 6 NEV. L.J. 401, 408 (2005).

53. See Cecily Rose, *Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations*, 28 B.C. THIRD WORLD L.J. 345, 350 (2008); *Peace Versus Justice*, ECONOMIST, July 6, 2006, at 42.

54. See KINGSLEY CHIEDU MOGHALU, *GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS* 152-53 (2006); ECONOMIST, *supra* note 53.

the government need both peace—an end to violence, healing of the parties, and perhaps repairing the relationship between the parties—and justice—typically viewed as the successful prosecution and renunciation of the violations—for the country to be able to move on.

1. *Justice Without Peace is Not Enough*⁵⁵

Justice without peace has proven to be only a temporary fix to conflict. Although the war crimes tribunal after World War II sentenced many Japanese leaders, the peace between Japan and neighbors such as China and Korea was limited to an end of actual fighting versus any rebuilding of relationships. As the focus of the Allies turned to propping up the Japanese government against communism, there was little dialogue between Japan and its victims and no truth-seeking, immediate apologies, or acknowledgments of wrongs committed. Japan's neighbors remained suspicious of Japan's true recognition of the human rights violations carried out in its name. Every visit to the cemetery holding some Japanese war criminals and every change to Japanese textbooks becomes an international incident.⁵⁶ Even in its own domestic dealings with Okinawa (the Japanese island where Japanese soldiers convinced native Okinawans to commit mass suicide rather than be captured by the Americans), the Japanese government is treated with suspicion, as it has not acknowledged what actually happened during the war.⁵⁷

A similar concern has been raised with the tribunal for the Former Yugoslavia and the actual relationship of the populations in Bosnia, Serbia and surrounding countries. The In-

55. Note that in transitional justice literature, this dichotomy is often phrased as "truth v. justice" but that phrase tends to refer to the balance between prosecution versus a truth commission. "Peace v. justice" is a broader umbrella term encompassing the choice of doing nothing.

56. See MOGHALU, *supra* note 54, at 2; Norimitsu Onishi, *In Japan's New Text: Lessons in Rising Nationalism*, N.Y. TIMES, Apr. 17, 2005, at C4; Joseph Kahn & James Brooke, *Chinese Official Cutes Short Japan Trip to Protest Shrine Visit*, N.Y. TIMES, May 24, 2005, at A4; Norimitsu Onishi & Howard W. French, *Ill Will Rising Between China and Japan as Old Grievances Fuel New Era of Rivalry*, N.Y. TIMES, Aug. 3, 2005, at A7; Norimitsu Onishi, *South Korean Leader Tells Japan's Leader to Stop Visiting Shrine*, N.Y. TIMES, Nov. 19, 2005, at A5.

57. Norimitsu Onishi, *Okinawans Protest Japan's Plan to Revise Bitter Chapter of World War II*, N.Y. TIMES, Oct. 7, 2007, at A6.

ternational Criminal Tribunal for the Former Yugoslavia (ICTY) has established groundbreaking law regarding human rights and war crimes.⁵⁸ The ICTY has now prosecuted many of the top political and military leaders involved; the prosecutors, defense attorneys, and judges are of the highest caliber; and the established law has been dramatic and clear. And yet the impact of these cases on the ground is mixed.⁵⁹ There is little ethnic reconciliation among the various ethnic groups and nationalities.⁶⁰ One could argue that ethnic cleansing was, in fact, achieved as the populations hardly interact today. Some have even argued that ethnic tensions have increased in the past few years as the perceived unfairness of the ICTY vis-à-vis the Serbs fuels their antagonism.⁶¹ Textbooks are now completely different, the histories of the war are different, and efforts to establish either a “true” or common history of the human rights violations have been stymied—even by the court itself.⁶²

Trials, often restricted to the top perpetrators, are limited in their long-term impact. A few convictions, by themselves, do not necessarily change the sentiments of the populations regarding the violations, or even directly help the victims. Justice, by itself, is not enough to resolve widespread human rights conflicts.

2. *Peace Without Justice Does Not Promote Reconciliation*

Peace without justice also does not seem to provide a long-term solution. The situation may appear “peaceful” since groups are no longer fighting, but true peace—in terms of reconciliation, healing, and stability—is more illusory. In some situations, peace on the ground has been accomplished through a bloodless transition to a new government and the granting of amnesty to the previous government. When Pi-

58. Patricia M. Wald, *ICTY Judicial Proceedings: An Appraisal from Within*, 2 J. INT’L CRIM. JUST. 466, 471-72 (2004).

59. See JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* 88-92 (2003); LYNNE JONES, *THEN THEY STARTED SHOOTING* 253-92 (2005).

60. JANE STROMSETH ET AL., *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 109 (2006).

61. Wald, *supra* note 58, at 466-67.

62. Priscilla B. Hayner, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 207 (2001).

nochet finally stepped down as the president of Chile with his Senator-for-Life designation, he was supposed to be immune from prosecution. The militaries in Argentina and elsewhere were granted amnesty for their actions in exchange for agreeing to step down without overthrowing the elected government.⁶³

In other countries, a combination of amnesty and truth commissions was used. In El Salvador, at the end of a civil war which claimed 75,000 lives, the new government promised a truth commission to investigate allegations of human rights violations. The truth commission could name names but amnesty was granted within a few days of the report's release.⁶⁴ And, in Guatemala, although the international experts serving on the truth commission were able to write a report, the report could not actually name the names of those who were responsible. Yet, twenty years later, these countries revisited those amnesty decisions and started to prosecute.⁶⁵ Even with "peace" and a shift to democracy, it is clear that the populations have been waiting for a true accounting of the violations and some kind of prosecutions or acknowledgments from that time.⁶⁶

Even the Truth and Reconciliation Commission (TRC) in South Africa has faced the problem of providing truth but not justice.⁶⁷ Most commentators noted that wide-scale prosecution for human rights violations under apartheid was unfeasible,⁶⁸ and the TRC provided the best of what all international systems were designed to do—allowing victims to tell their stories, perpetrators to convey what actually happened, a full history of the apartheid era to be written, and a new government

63. See Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 933-34 (2009).

64. Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 521, 537 (1994); Personal Communication with Judge Buergenthal (Mar. 2005).

65. See, e.g., Larry Rohter, *Argentine Ruling Revives Cases of 'Dirty War' Victims*, N.Y. TIMES, July 15, 2005, at A3; Larry Rohter, *Chilean Court Revokes Pinochet's Immunity from Prosecution*, N.Y. TIMES, May 29, 2004, at A5.

66. Laplante, *supra* note 63, at 925.

67. For information about the commission, see Truth and Reconciliation Commission, Official Website, <http://www.doj.gov.za/trc/> (last visited Apr. 4, 2006).

68. Note that a few high-level prosecutions were carried out for the most egregious crimes in South Africa.

to *peacefully* transition to power. In many ways, South Africa is one of the greatest dispute resolution stories. And yet, the part of the TRC design that provided for justice—in the form of economic development and land redistribution—never fully operated. And so, while the “truth” part of the TRC has been handled rather well, the “reconciliation” part waits for economic reality.⁶⁹ Studies conducted by James Gibson and others have demonstrated that citizens’ views of the TRC vary widely depending on the respondent’s race and how the respondent’s economic situation has changed since the TRC.⁷⁰ If the economic situation improved, then the respondent thought the TRC had accomplished its goals. On the other hand, if the respondent still lived in townships with limited economic changes and opportunities, his or her view of the TRC was primarily negative.⁷¹ So even in South Africa, peace through truth-telling has not been considered full justice unless more extensive reparations in terms of economic development were also accomplished.

3. *Peace and Justice: Needed When Establishing a System*

Debates framing “peace versus justice” as a zero-sum game disregard the complexity of the issues and the fact that most conflicts really require both peace *and* justice in order to move forward.⁷² In many conflicts, the peace versus justice tension is actually more a trade of delayed justice for peace now: Alberto Fujimori, Peru’s ex-President between 1990-2000, is on trial for human-rights violations; Khieu Samphan, Cambodia’s president from 1976-1979, is awaiting his trial before a UN-backed tribunal; the president of Chad in the 1980s, Hissene Habre, is awaiting trial for crimes against humanity in Senegal; and both

69. Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework*, 2 INT’L J. TRANSITIONAL JUST. 331, 338-39 (2008).

70. JAMES L. GIBSON, OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION? 262 (2004); TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER? 29-30 (Audrey R. Chapman & Hugo van der Merwe, eds., 2008). See also Carrie Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 2 CARDOZO J. CONFLICT RESOL. 97, 108-09 (2004) (discussing how race and participation in the TRC can affect attitudes toward the rule of law and fairness of governmental institutions).

71. JAMES GIBSON, OVERCOMING APARTHEID 287 (2004).

72. See STROMSETH ET AL., *supra* note 60, at 251-52 (2006).

Augusto Pinochet and Slobodan Milosevic only escaped trials by dying.⁷³ The Inter-American Court for Human Rights has even held that blanket amnesty for human rights violations is a violation of international law.⁷⁴

So, what systems can deal with the need for both peace and justice? Not surprisingly, the answer is that different processes may be required to meet these different needs. This is a key lesson that the international community has been somewhat slow to realize. Rwanda, with its perceived messy overlap of international and domestic processes, prosecution and truth commissions, and formal and informal processes may, in the end, be the success story in managing peace and justice tensions.⁷⁵ The various processes in Rwanda include the International Criminal Tribunal for Rwanda (ICTR), local Rwandan domestic prosecutions, other countries' domestic prosecutions (Belgium, in particular), and indigenous *gacaca* courts.⁷⁶ Initially, some commentators worried that the variety of prosecutions and processes would be confusing and prevent the country from moving forward.⁷⁷ In fact, the variety of

73. See *International: Bringing Bigwigs to Justice: Charles Taylor in the Dock*, *ECONOMIST*, Jan. 10, 2008, at 52 (discussing bringing heads of states to trial for crimes committed while in office).

74. Laplante, *Outlawing Amnesty*, *supra* note 63, at 938-39.

75. See generally ELIZABETH NEUFFER, *THE KEY TO MY NEIGHBOR'S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA* (2001).

76. These *gacaca* courts are run locally, with the judges elected from the villages where the offenses took place. Often, the judges know both the victim and the accused. These trials are held outdoors and are observed by anyone that wants to be there. One of the key focuses of these trials is a confession and apology in which the accused often admits to what they did, and asks to be let back into the community. The judges then come up with what they consider to be a suitable punishment. There are currently about fifteen thousand of these courts. See generally Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355 (2004) (arguing that shifting the emphasis from the retributive nature of Gacaca to its restorative potential may offer better perspectives for reconciliation); Catherine Honeyman, et al., *Establishing Collective Norms: Potentials for Participatory Justice in Rwanda*, 10 PEACE AND CONFLICT: JOURNAL OF PEACE PSYCHOL. 1 (2004) (exploring the Inkiko-Gacaca process as a potential method for healing inter-group conflict through a collaborative process of establishing common social and moral norms); Jessica Raper, *The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide*, 5 PEPP. DISP. RESOL. L.J. 1 (2005) (discussing the Gacaca system).

77. See Phil Clark, *Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT'L L. REV. 765, 776

courts permitted different types of prosecutions. The “big” names (high command) went to the ICTR where important public law could be made. Several of the cases from the ICTR were groundbreaking in their holdings, including officially naming rape as a war crime and convicting the media in Rwanda for incitement.⁷⁸ “Medium” figures were arrested by the thousands in Rwanda and the domestic courts have (slowly) moved through prosecuting them. And the *gacaca* system has helped on the local level to provide both truth and justice to the victims. As Judge Patricia Wald has written, there are “drawbacks to the ‘big fish’ strategy” of only investigating and prosecuting the planners or instigators of the atrocities, as was done in Yugoslavia.⁷⁹ This creates an “immunity gap,” as she calls it, where lower-level tormentors often return to their village and assume positions of power. So, in Rwanda, the variety of courts and *gacaca*, national and local prosecutions, and Western and indigenous methods has accomplished quite a bit⁸⁰—and more than those post-conflict situations which only chose one method.

B. *Who Designs, Implements, and Has Rights in the System?*

A second problem in the normalization of international adjudication is introducing solutions from the international community’s top-down perspective, when the process must take place from the bottom up. After all, the impact of any structure will be measured more by how the structure affects the post-conflict society than by its effect on the international community.

The most well-known structures have been designed by international elites. The various *ad hoc* courts established by the UN for Yugoslavia and Rwanda are clear examples and have been criticized for their distance—physical and psychological—from the affected countries.⁸¹ Even in more recently cre-

(2007) (noting the *gacaca* system was “viewed by much of the population as a new and perhaps confusing or even disagreeable entity”).

78. NEUFFER, *supra* note 75, at 272, 384, 455.

79. Patricia M. Wald, *Foreword: War Tales and War Trials*, 106 MICH. L. REV. 901, 915 (2008).

80. Given the numbers of people who participated in the genocide, even these multiple layers of processes do not reach all perpetrators.

81. See, e.g., STROMSETH ET AL., *supra* note 60, at 268, 271 (referring to the ICTY as distant and noting that the Tribunal is located outside of Rwanda

ated courts, this concern has not been fully addressed. The Sierra Leone hybrid court was designed to try to meet some of the concerns about the ICTR and the ICTY by using a mix of international and local judges with a mix of international and local law.⁸² But with only a few Leoneans at the top levels of the court and many members of the local legal community avoiding it altogether, there were questions as to whether the decisions of the court would have any precedence within Sierra Leone or be enforceable at all.⁸³ The tribunal for the Khmer Rouge in Cambodia, designed by the international community, has similarly been unsuccessful in its battle for public perception.⁸⁴ The tribunal faced many challenges early on, including widespread allegations that some judges and staff were required to kick back part of their salary in order to keep their jobs.⁸⁵ Some have even argued that the UN did not investigate these claims in an attempt to keep the court moving forward and many have argued this is too little, too late.⁸⁶

Such top-down design has also been an issue for truth commissions. The truth commission in El Salvador, created relatively early, in 1992, consisted entirely of international commissioners and staff members, and purposely excluded Salvadoran natives due to the civil war and a desire to be per-

and that many Rwandans feel the individual perpetrators rather than the architects of the genocide matter more); Patricia M. Wald, *International Criminal Courts—A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 336 (2006) (noting the physical distance of the Tribunals and their inability to reach the hearts and minds of the local populace affected by the war crimes).

82. MOGHALU, *supra* note 54, at 104-5.

83. See Tom Perriello & Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny*, in INT'L CTR. FOR TRANSITIONAL JUSTICE, at 1, 14, 18, 20-21 (Prosecutions Case Studies Series, 2006), available at <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf>. However, the court has spent a lot of time and effort on outreach programs, and a recent poll shows that most Leoneans have a generally positive opinion of the court.

84. See Panel, *The Impending Extraordinary Chambers of Cambodia to Prosecute the Khmer Rouge*, 5 SANTA CLARA J. INT'L L. 326, 326-34 (2007); Kathleen Claussen, *Up to The Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia*, 33 YALE J. INT'L L. 253, 258 (2008).

85. John A. Hall, *The Khmer Rouge Tribunal's Rebirth*, WALL ST. J., June 9, 2008, available at <http://www.cambodiatribunal.org/CTM/The%20Khmer%20Rouge%20Tribunal's%20Rebirth%20-%20WSJ.com.pdf>.

86. John A. Hall, *In the Cambodian Judge's Court*, WALL ST. J., May 28, 2009, available at <http://online.wsj.com/article/SB124344451220159175.html>.

ceived as neutral.⁸⁷ Instead, the truth commission was not trusted initially by Salvadorans because it lacked local perspective, and it had to work hard to overcome that suspicion.⁸⁸

In other cases, these structures were established by the domestic elite—South Africa's Truth and Reconciliation Commission is an early example where politicians created a system for the populace to use. In either situation, though, the structures have been created by foreign or domestic elites to serve victims that are often spread throughout the country and come from lower economic classes. At the same time, these structures will not be created at all without international support. This creates the second problem for the normalization of international adjudication—needing both external and internal commitment. External and internal commitments to the process are necessary to ensure both top-down and bottom-up compliance.

1. *Need for External Commitment to Process*

First, the international community needs to be fully committed to the dispute system it creates—whether it is a traditional court, a hybrid court, or a truth commission. External commitment from neighboring countries is needed so that they agree to provide support for the country and not to destabilize the situation by, for example, closing their borders, or serving as havens for rebel groups as in the Congo. The broader international community must also support the structure—with money and recognition, or even sometimes with peacekeepers or extradition ability—so that the country can properly implement its process.⁸⁹ The lack of money and the impact thereof has been well-documented in the tribunals for Rwanda,⁹⁰ Sierra Leone, and East Timor,⁹¹ among others.

87. Zinaida Miller, *Settling with History: A Hybrid Commission of Inquiry for Israel/Palestine*, 20 HARV. HUM. RTS. J. 293, 300 (2007).

88. *Id.* at 316-17.

89. For the story of international pressure to get Nigeria to turn over Charles Taylor to the Special Court in Sierra Leone see MOGHALU, *supra* note 54, at 120-22.

90. Press Release, Budget Committee, Budget Committee Approves 2004-2005 Financing for Former Yugoslavia, Rwanda Tribunals, UN Doc. GA/AB/3655 (Dec. 15, 2004) available at <http://www.unis.unvienna.org/unis/pressrels/2004/gaab3655.html> (announcing a \$255.9 million for the Rwandan Tribunal for 2004-2005). Note that the lack of funding for the

This lack of funding leads to delays in investigation and resolution and the potential breakdown of the process.⁹² In Sierra Leone, funding was so scarce that judges split their days between two trials at once since there were not enough judges. The tribunal had even been told to limit its photocopying.⁹³ Perhaps hybrid tribunals and truth commissions will cost less than courts and also lead to more creative structures. The multiple locations of the Liberian truth commissions, including in Minneapolis, is one such example of a creative structure.⁹⁴

2. *Internal Commitment—Ensuring Rights for the Victims*

Perhaps even more importantly, the country's own government must have an internal commitment to change in order to have real impact on the post-conflict community. Internal commitment can be measured in three ways. First, the post-conflict structure must be viewed as legitimate by the parties and by the populace of the affected country or countries.⁹⁵ The government that implements a truth commission or starts

Rwandan domestic *Gacaca* courts seriously hampers their effectiveness as well. See Honeyman et al., *supra* note 76, at 13-14 (noting a shortage of supplies for training *gacaca* judges).

91. Herbert D. Bowman, *Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor*, 18 EMORY INT'L L. REV. 371, 388-89 (2004) (chronicling budgetary restrictions in East Timor); Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 258 (2003); Perriello & Wierda, *supra* note 83, at 29-32.

92. Even the well-funded tribunal at the ICTY dealt with bureaucratic and financial issues. As Judge Wald noted, "I could not get a pencil sharpener because they were not on the procurement list." Wald, *supra* note 81, at 322.

93. Andreas O'Shea, *Ad Hoc Tribunals in Africa: A Wealth of Experience but a Scarcity of Funds*, 12 AFR. SECURITY REV. 17, 19 (2003).

94. See, e.g., Advocates for Human Rights, Liberian Truth and Reconciliation Commission Diaspora Project, <http://liberiatrnc.mnadvocates.org/> (last visited May 31, 2009). See also Lisa J. LaPlante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 78-91 (2008) (discussing creative structures to negotiate between communities and companies investing in natural resources).

95. See STROMSETH, *supra* note 60, at 132 (discussing post-conflict blueprints and noting the challenge of a divided population); Panel, *supra* note 84, at 98 (noting the possibility of ending up with "the worst of both worlds, a court that neither the international community nor the domestic population will find legitimate").

domestic prosecutions needs to be willing to have its own past carefully examined. Understandably, this is not always an easy decision for those who have recently gained power. If a government is not sufficiently stable or democratic to permit a full airing of the truth, this decision can be especially difficult.⁹⁶ Furthermore, the people themselves need to wish to explore the truth—if they want or need to move on, a truth commission or *ad hoc* tribunal will not serve them well.⁹⁷

In South Africa, the TRC was viewed as playing a legitimate role at the end of apartheid. The TRC's reports and witnesses commanded great credibility among the public and proceedings were televised in their entirety. The process was also viewed as fair (albeit with many problems) by both observers and participants.⁹⁸ On the other hand, the ICTY was for some time seen as unfair and biased against Serbians. Trials and proceedings were not shown on Serbian television, and commentators decried the fact that, at least at the beginning, all of the defendants were Serbian.⁹⁹ In early *gacaca* courts in Rwanda, only crimes against Tutsis were considered, to the exclusion of retaliation crimes against Hutus.¹⁰⁰ These issues were eventually fixed but they initially delayed the perceived legitimacy of the structures. The importance of public acceptance cannot be underestimated in terms of effecting real change in a conflict.

96. This is Carlos Nino's argument based upon the experiences in South America transitioning out of dictatorship into democracy. Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L. J. 2619 (1991). But see Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537 (1991) (proposing a general requirement for prosecution of those responsible for brutal crimes).

97. See AVISHAI MARGALIT, *THE ETHICS OF MEMORY* 9-13 (2002) (outlining this debate).

98. GIBSON, *supra* note 70, at 266-68, 284-88.

99. One could of course argue that this was because most of atrocities have been carried out by Serbians but it did help in terms of internal commitment once the ICTFY started to prosecute a few Croats and Bosnians. Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUST. 89, 90 (2009).

100. See Honeyman, et al., *supra* note 76, at 18-19, 22; Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 HUMAN RIGHTS BRIEF 16, 18 (2007).

The second requirement of internal commitment that experts have noted is the important need to educate the population—particularly children—about a conflict in order to allow society to move forward.¹⁰¹ In interviews with Bosnian Serbian children after the war, very few understood the role (and fault) of their government and forces during the war.¹⁰² In Japan, textbooks continue to downplay the level of atrocities carried out by the Japanese. These two examples can be compared with the education of West German children after World War II, which clearly outlined the human rights violations of their own government.¹⁰³ The role of the media in publicizing trials and truth commission reports is crucial to ensuring post-conflict understanding and stability.

Whether the government has the political will to participate in the system is the third measure of the government's internal commitment. Unfortunately, cases showing a lack of will are relatively easy to find in post-conflict resolutions. The Serbian and Bosnian Serbian governments only recently had the political will to search for and hand over to the ICTY some of the higher-ranking officials involved in atrocities.¹⁰⁴ In Indonesia, although the government has promised to prosecute violators of human rights, no indictments have actually been handed down. At the one trial in Indonesia that has occurred thus far, all five army officers were acquitted.¹⁰⁵ And, as pointed out earlier, truth commissions in South America only operated in lieu of prosecutions.

The most successful systems have tried to balance the fact that elite members of the international and/or domestic com-

101. *But see After the Riots*, *ECONOMIST*, Dec. 17, 2005, at 47 (noting that the debate over textbooks in France can actually fuel the flames of conflict rather than controlling them). David Matz, *Intervening in the Israeli-Palestinian Conflict: A Strategy and its Risks*, 19 *NEW ENG. J. PUB. POL'Y* 329, 332-33 (2005).

102. JONES, *supra* note 59, at 104-05, 109-10, 117, 125-28. *See also A Better View of the Bad Guys*, *ECONOMIST*, Dec 17, 2005, at 48 (outlining the progress made on "history manuals" for the Balkans which outline Balkan history from a variety of ethnic viewpoints).

103. *See, e.g.,* GITTA SERENY, *THE GERMAN TRAUMA* (2000).

104. *See* Nicholas Wood, *Prosecutor Says No. 1 War Crimes Suspect is Hiding in Belgrade*, *N.Y. TIMES*, Feb. 12, 2004, at A8.

105. STROMSETH, *supra* note 60, at 280-281. *See also Indonesian Wins Appeal Against Rights Verdict*, *N.Y. TIMES*, Nov. 6, 2004, at A6; Wald, *supra* note 81, at 332-33.

munities helped establish the system while strongly promoting local, bottom-up participation. For example, East Timor's Commission for Reception, Truth and Reconciliation took a different approach than other truth commissions by traveling throughout East Timor to hear the perspectives of the people, and by establishing reconciliation processes in collaboration with local governments. This action brought the Commission and its work to traditional settings, which helped make the people more comfortable with the Commission.¹⁰⁶ Similarly, Liberia's truth commission is taking testimony in a variety of locations.¹⁰⁷

C. *How does the Process Work?*

The third problem in the normalization of international adjudication is in the procedure each system adopts. The challenge of setting up an adjudication system is how to deal with large-scale violations and problems when each case and crime is painfully individual. Legal models transferred with little thought from one international crisis to the next will not work, as the evolution to hybrid tribunals demonstrates. Hence, we can see the evolution of the international adjudication model from Nuremberg to Yugoslavia and Rwanda, and finally to locally hosted hybrid tribunals. However, customizing each aspect of a tribunal or TRC is time-consuming and expensive. And, as we can see from the various financial crises faced by the newer *ad hoc* courts, the international community has a funding limit. The ICC can relieve some of the funding burden but might not be able to meet the broader healing needs of each community. Examining both domestic and international dispute systems provides lessons in balancing efficiency and individuality.

1. *Lessons from Mass Tort Dispute System Design in the U.S.*

The handling of mass tort claims¹⁰⁸ in the past few decades has some very clear lessons that we can glean and trans-

106. Jane E. Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 293 (2007).

107. See, e.g., Advocates for Human Rights, *supra* note 94. See also LaPlante & Spears, *supra* note 94, at 78-91.

108. These claims are primarily private claims against private companies and thus not really human rights violations per se.

fer to international adjudication. First, we can learn from asbestos litigation what *not* to do.¹⁰⁹ One of the huge problems of asbestos litigation has been that there has not been a uniform system put into place for compensating victims. Instead, the court system and existing structures of tort law were relied upon, resulting in a very mixed record of success. For example, some victims who were only slightly affected were grouped with those seriously affected and received bulk settlements that were worked out in advance with the target companies. Because it was built case-by-case over time, without thinking of how the future might look, asbestos litigation has become a procedural nightmare for all parties involved.¹¹⁰

More recently-designed mass tort systems provide better frameworks. In the Dalkon Shield litigation, the personal arbitration hearings on harm provided needed customization while efficiencies of scale were also utilized. Payout grids gave rough calculations of what different injuries were worth. Arbitrators were trained together. This system provided an opportunity for each person to tell their story while remaining efficient.¹¹¹ Even more dramatically, the 9/11 Commission worked very hard to balance needed efficiency—processing claims, providing compensation, and operating under timelines—while ensuring that each grieving family member was given the space to tell their story.¹¹² Remarkably, over seven thousand claims were handled within three years.¹¹³

109. Asbestos was used in a huge variety of products because of its flame-retardant properties, starting early in the twentieth century. However, exposure to asbestos causes a number of serious respiratory problems that generally don't develop for 20-30 years. Because of the widespread use, the delayed onset, and the seriousness of the conditions, the prospects for damages were immense.

110. See generally DEBORAH R. HENSLER ET AL., INSTITUTE FOR CIVIL JUSTICE, *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* (1985). For more on one successful feature of asbestos litigation, the Wellington Claim Facility, see Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1608 (1995).

111. Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.S. L. REV. 513, 522-23 (1998).

112. KENNETH R. FEINBERG, *WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* 21, 43-44 (2006).

113. *Id.* at 203.

2. *Lessons from International Dispute Systems*

We also need to learn from past international examples. The Yugoslavia and Rwanda tribunals are similar in their laws, jurisdiction, and requirements for proof. The next evolution was to *ad hoc* tribunals like in Sierra Leone, culminating in the standing tribunal of the ICC. Similarly, truth commissions have developed a common model over the past decades as they too have been implemented around the world. Truth commissions tend to have four main characteristics: (1) a focus on the past, (2) an investigation of a pattern of abuse, (3) a temporary body, and (4) state sanctioning or empowerment.¹¹⁴

How can we reconcile the joint needs of standardization and customization? We can create default legal frameworks—for courts, tribunals, and truth commissions—with best practice manuals containing lessons gleaned from around the world. For example, what is our best advice regarding jurisdictional timeframes? We learned that having only six months to investigate a twenty-year civil war in Guatemala was too short for the truth commission. System designers must also recognize that closed sets of victims (i.e., a limited, known set of victims) must be handled differently than open sets of victims. The 9/11 Commission had the advantage of a closed set of cases (the victims were known, the event was over, and future plaintiffs were unlikely to emerge) and could plan for a determined future with a clear end date.¹¹⁵ An international tribunal dealing with a limited time period or a limited segment of the population affected—like Rwanda, where atrocities were committed in a limited time period, or Guatemala, where a more limited segment of the population was targeted—may be able to act more like the 9/11 Commission in establishing a set end date. On the other hand, one could imagine a system set up for Israeli-Palestinian claims which could potentially involve huge swaths of the population and take large amounts of time.¹¹⁶ Of course, certain pieces of any process need to be customized by asking the kinds of questions that DSD focuses upon. Once the system's purpose is identified, the question

114. HAYNER, *supra* note 62, at 14.

115. FEINBERG, *supra* note 112, at 16-21.

116. Perhaps this also explains the concerns with U.S. tribunals for our own violations—how do you set a time limit for the effects of slavery?

becomes who should be part of the process. To answer this question, process designers need to answer more questions. Who committed the atrocities (segments of the population, race, ethnicity, the leadership, etc.)? How geographically widespread were the pattern of violations? What types of atrocities were committed (murder, disappearances, rape, imprisonment, torture, etc.)? For example, in Chile, the truth commission could only investigate disappearances and murders. Torture victims who actually survived had no recourse through the commission, exposing the commission to harsh criticism for missing a crucial part of the story.¹¹⁷

Aside from the legalistic and factual questions above, cultural differences must also be taken into account when customizing the international system. A revealing story told by Professor Jane Stromseth regarding the establishment of the East Timorese tribunal reflects this concern. When setting up the tribunal, UN experts found themselves in a quandary. In Timorese culture, defendants were expected to confess to crimes truthfully with the expectation that sentences would be determined with compassion. In order to train the Timorese in the adversarial, Western model that is typical for criminal law, "the UN experts had to train the Timorese to lie."¹¹⁸ Another example of the significance of cultural differences is the Khmer Rouge tribunal: commentators have worried that this tribunal does not match the values of the Buddhist Cambodian population.¹¹⁹ There are other practical considerations to take into account as well. One is the basic difference between how courts in civil law and common law countries use precedent and how international law will interact with the domestic legal system.¹²⁰ Another practical issue involves thinking about where within a country to set up offices for a tribu-

117. HAYNER, *supra* note 62, at 73.

118. MOGHALU, *supra* note 54, at 14.

119. See, e.g., Panel, *supra* note 84, at 332; Virginia Hancock, "No-Self" At Trial: How to Reconcile Punishing the Khmer Rouge for Crimes Against Humanity with Cambodian Buddhist Principles, 26 WIS. INT'L L.J. 87 (2008) (arguing that the tribunal "may be compatible with Theravada Buddhism if certain conditions, such as the establishment of detailed and explicit sentencing procedures, are met").

120. See, e.g., Wald, *supra* note 81, at 323 ("Because ICTY judges came from quite varied law systems, the Rules of Procedure and Evidence represented a mix of common law and civil law systems, originally tilting in favor of the former but gradually taking on many aspects of the latter.").

nal or truth commission. Priscilla Hayner relates the story of how the truth commission in El Salvador set up its offices in the heart of the capital's wealthiest neighborhood, unwittingly causing even more stress to victims visiting the offices.¹²¹

In each of these three challenges, while there are many examples of frustration and processes gone wrong, the lessons have been learned. Over time, each of these problems has been met with innovation and evolution such that we can look forward to possibilities emerging in the future of international adjudication.

III. THE POSSIBILITIES OF BARGAINING IN THE SHADOW OF (INTERNATIONAL) LAW

The possibilities for the normalization of international adjudication occur in two different areas. First, as adjudication becomes the norm and more law is created, parties may choose to negotiate or mediate on their own. The early reasons for establishing international adjudication—outlined in Section I above and focusing on procedural justice—may be eliminated over time as the law on human rights is clarified and strengthened. When countries or individuals can predict the outcome of the court in advance, they might be more willing to plea bargain (as is already happening at the ICTY) or negotiate the remedies themselves. Second, with the plethora of human rights structures—courts, *ad hoc* tribunals, truth commissions—the development of creative remedies might be advanced. I deal with each of these possibilities below.

A. *Consensual Dispute Resolution*

One possibility arising from the normalization of international adjudication is that we start to see a voluntary move away from adjudication. As the law becomes more standardized, transparent, predictable, and understood, countries might turn to consensual dispute processes attached to courts or adjudicatory bodies—they will be bargaining in the shadow of (International) Law. As the rights of human rights victims vis-à-vis their governments become clear, will we see victims (or NGOs on their behalf) negotiating settlements in advance of adjudication?

121. HAYNER, *supra* note 62, at 149.

This has great possibility, but the rush to dispute resolution cannot be too fast. For international disputes, particularly those dealing with transitional justice, the rule of law must first be established in courts before the values of procedural justice can be realized in consensual processes. We cannot promote consensual dispute resolution, or create a court-connected ADR system as in the United States without an established government, human rights protections, and a working court system. The process of dispute resolution does not inherently provide these values unless the settlements are based on core values of justice and equality. Otherwise, consensual dispute resolution is just another set of processes to be abused by those with power.¹²² This is similar to the understanding (not always recognized) that democracy is not achieved by elections alone. The *process* does not create democracy, but rather the laws upon which the process operates do so. For democracy, we need the equivalent of the Bill of Rights (rights for minorities, freedom of speech, freedom of association, protection from arbitrary detention, etc.). Similarly, a voluntary process like dispute resolution without the backdrop of a court system that operates to protect rights is unlikely to be a step forward.

In the United States, we are generally quite sure that the law will be enforced. So, even when we use ADR, we know that we are bargaining in the shadow of a longstanding body of law we can count on.¹²³ As we create international systems, we need to think carefully about the underlying legal structures, the law, and how it is implemented. Where the rule of law already exists, perhaps more domestic and consensual processes can be used. But where inequality and a lack of rights permeate the legal landscape, international courts and hybrid tribunals are a necessary first step.¹²⁴ Nonetheless, as international criminal and human rights law evolves, we can expect to see a return to diplomacy, a return to negotiation,

122. See Laura Nader & Elisabetta Grande, *Current Illusions and Delusions about Conflict Management—in Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 573, 578 (2002).

123. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

124. See Lisa J. Laplante, *Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention*, 22 NETH. QUART. HUM. RTS. 347 (2004) (explaining why in Peru, victims must go to the Inter-American Court for justice as the local courts provide no remedy).

and a likelihood of increased bargaining in the shadow of international law.

B. *More Creative and Reparative Remedies*¹²⁵

With more tribunals and truth commissions in operation around the world, another possibility is that there are more implicit conversations about appropriate remedies for human rights victims. In the case of human rights violations, there is an ongoing debate about whether such loaded words as justice or reconciliation are achieved through prosecutions, monetary reparations, or more directed benefits like free education to the children of those murdered, health care for torture victims, new schools for decimated villages, and so on. Some truth commissions have made awards with such directed benefits, and the Inter-American Court of Human Rights has handed down some of these remedies as well.¹²⁶ Assuming that human rights violations around the world will not cease anytime soon, what will the routinization of these types of institutional responses bring in terms of creative and helpful remedies?

The traditional method for dealing with human rights violations (once the international community actually started to recognize these violations) has been the trial. And, as we know, Nuremberg, Tokyo, Rwanda, and Yugoslavia have been very important in establishing the principle that violators will be punished. But, as we also know from studies of these conflicts, and even studies of domestic criminal trials, punishment of perpetrators often does not entirely heal victims. Even those who recognize that punishments cannot go far enough (or do not cover the full extent of atrocities committed) argue in favor of trials for other reasons. First, only through international trials will other leaders be dissuaded from committing atrocities. International trials, like domestic trials, serve a deterrent function in the operation of international law.¹²⁷ Tri-

125. The term “remedies” here refers to the traditional domestic understanding of remedies, as in what will the victim receive, as opposed to the use in international law and transitional justice, which can use “remedies” to refer to the judicial options available to the victim (e.g., trial).

126. Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. OF TRANS-NAT’L L. 351, 407-19 (2008).

127. Panel, *supra* note 84, at 329.

als also create law, often new and important law, that serves to protect future victims and give individuals further rights against their oppressors. Finally, trials provide a historical record.

The challenge for international dispute system design, however, is that the scale of international atrocities often means that trials will not go far enough in providing either punishment or a historical record for the vast number of those killed. As I have already discussed, trials are unwieldy, costly, and often focus on the “big fish” only. Yet, as Judge Wald relates, when the “little fish” is the one that killed your family, the big fish/little fish distinction becomes insulting to victims.¹²⁸

At the same time, traditional dispute resolution has not always been helpful in dealing with the past either. In mediation training, mediators are often taught that helping parties focus on the future and move on from the past will help move the mediation closer to settlement.¹²⁹ But, as Trina Grillo wrote early on in the history of domestic mediation, this deliberate elimination of the past can do great harm.¹³⁰ If history holds the story of why the parties are there in the first place, it can be frustrating and dehumanizing to not even be allowed to tell that story. Carrie Menkel-Meadow more recently outlined how new processes can balance the past with the future, including recognizing that the past is an “essential part of justice.”¹³¹

So how can we create processes that are more victim-focused? Restorative justice domestically and overseas has useful lessons for international systems.¹³² First, we can create structures that allow as many victims as possible to tell their stories. This type of structure deals with multiple issues outlined above: truth-telling provides both peace and justice, it works to insure bottom-up participation and legitimacy, it allows individual stories to be told, it provides voice for the victims, and it has been one of the best processes for acknowledging the past.

128. See Wald, *supra* note 79, at 914-18.

129. Menkel-Meadow, *supra* note 70, at 98.

130. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1564 (1991).

131. Menkel-Meadow, *supra* note 70, at 104.

132. See generally Carrie Menkel-Meadow, *Restorative Justice: What Is it and Does it Work?* 3 ANN. REV. L. SOC. SCI. 10.1 (2007).

As Judge Wald writes, perhaps truth commissions cannot fully pacify the deep grievances of victims, but they may provide a more intimate and flexible forum that is more helpful.¹³³

Second, courts themselves can start to become more creative with their approaches to victims. As Professor Thomas Antkowiak has noted in reviewing the history of the Inter-American Court, the Court has moved strikingly from early decisions that acknowledged “wrongs” and ordered the state to pay compensation, to now providing employment, medical and psychological care, education, and public apologies to the families of victims.¹³⁴ Similarly, in Sierra Leone, the truth commission recommended health care and free education for victims.¹³⁵ These concrete remedies might be far more important to the victims of atrocities than a guilty verdict in a foreign court. They may also start to meet the concerns left in South Africa, where we now know that economic development is necessary to move a post-conflict society forward.

These more creative needs might not always be the focus of the international community. After all, guilty verdicts in international courts are easier to measure and to explain to an international (funding) public. But these systemic needs and concerns of victims in the post-conflict society “must be addressed if a stable rule of law is to take root.”¹³⁶

The concept of a conversation—among courts, tribunals, and truth commissions—not only about the actual law of human rights but also about the appropriate remedies, would be a great benefit to the normalization of international adjudication.

CONCLUSION

As the streams of international criminal law and human rights law have increasingly utilized international adjudication in the last ten years, this pattern has created interesting comparisons with a similar increase in domestic consensual dispute resolution. The analogous goals of increased voice, procedu-

133. Wald, *supra* note 79, at 920. See also Ellen Waldman and Frederic Luskin, *Unforgiven: Anger & Forgiveness*, in THE NEGOTIATOR'S FIELDBOOK 435-43 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

134. Antkowiak, *supra* note 126, at 366.

135. STROMSETH, *supra* note 60, at 256.

136. *Id.* at 257.

ral justice, and fairness are being accomplished in both arenas. Using dispute resolution theory, we can also see how certain challenges faced by the international systems have been handled. Rather than creating systems that provide either truth or justice, we now employ various processes to provide multiple remedies and meet the goals of victims, societies, and the international community. Rather than designing systems solely by the elite to the citizens, we now have more integrated and creative processes to ensure both external and internal commitment to recovery. And, rather than providing only individual litigation or individual prosecution to protect rights, we now have systems that can hear individual stories while efficiently operating to provide larger remedies. This suggests a potential for continued evolution of international adjudication and dispute resolution in at least two different ways. As the law is increasingly transparent and enforceable, countries and individuals will likely turn back to traditional diplomacy and be able to bargain in the shadow of international law. In addition, the cross-fertilization among human rights courts, truth commissions, and even domestic courts has the opportunity to push increasingly creative and responsive remedies for victims based on restorative justice. As international human rights adjudication moves out of its adolescence in the next ten years, its maturity could be even more revolutionary.